

United States District Court for the District of Delaware

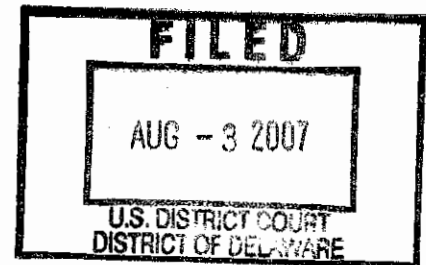
John H. Benge, Jr.,)
Petitioner Below/)
Appellant)

v.)

Michael DeLoy, Warden)
Sussex Correctional)
Institution; and)
Joseph R. Biden, III,)
Attorney General of the)
State of Delaware,)
Respondents Below/)
Appellees)

Court of Appeals
No. 07-3229

Delaware District Court
Civil Action No. 05-0550(GMS)



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MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

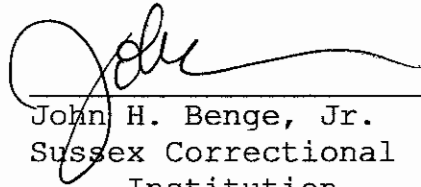
Comes Now, Appellant John H. Benge, Jr., petitioner below/appellant ("Appellant"), and moves this Honorable Court for leave to file the appeal in the above captioned matter without prepayment of the costs therefor or the posting of security therfor and to proceed *in forma pauperis*. The grounds for this motion is that because of Appellant's poverty he is presently unable to pay such costs or post security therefor.

Appellant has previously been granted leave to proceed *in forma pauperis* in the Supreme Court of the United States; the Supreme Court of Delaware; and the Court of

Chancery of the State of Delaware in and for New Castle County.

Appellant's affidavit or declaration in support of this motion is attached hereto; Appellant has ordered a six month statement from the prison business office which will be forwarded to the Court as soon as it is received by Appellant.

Date: August 2, 2007



John H. Bengé, Jr.
Sussex Correctional
Institution
P.O. Box 500
Georgetown, DE 19947

United States District Court for the District of Delaware

John H. Benge, Jr.,)	
Petitioner Below/)	Court of Appeals
Appellant)	No. 07- 3229
)	
v.)	Delaware District Court
)	Civil Action No. 05-0550(GMS)
Michael DeLoy, Warden)	
Sussex Correctional)	
Institution; and)	
Joseph R. Biden, III,)	
Attorney General of the)	
State of Delaware,)	
Respondents Below/)	
Appellees)	

**Affidavit Accompanying Motion for
Permission to Appeal *In Forma Pauperis***

Affidavit in Support of Motion

I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury that my answers on this form are true and correct. (28 U.S.C. § 1746, 18 U.S.C. § 1621).

Signed: 

Date: August 2, 2007

Instructions

Complete all questions on this application and then sign it. Do not leave any blanks. If the answer to a question is "0," "none," or "not applicable (N/A)," write in that response. If you need more space to answer a question or to explain your answer, attach a separate piece of paper identified with your name, your case's docket number, and the question number.

Nature of the appeal: this is an appeal by a prisoner in state custody from dismissal by the District Court of a federal habeas corpus petition and denial by the court below of as certificate of appealability.

My issues on appeal are:

1. Whether Rule 8 of the Rules of the Supreme Court of the State of Delaware, as applied by that court, is an "independent and adequate state rule of decision" constituting a procedural bar to federal *habeas corpus* relief.

[As to issue No. 1, Petitioner understands that this Court has previously issued a CAPP in *Campbell v. Carroll*, U. S. District Court, Delaware C.A. No. 05-5156, order, September 21, 2006 on that same issue].

2. Independently of Issue No. 1, whether the procedural bar applied by the Delaware Supreme Court in this case requiring not only a contemporaneous objection to prosecutorial misconduct *but also* an objection to a curative instruction *and* a motion for a mistrial was a procedural bar applied in the first instance in state court in this case and is therefore not a bar to federal *habeas corpus* relief pursuant to this Court's decision in *Reynolds v. Ellingsworth*, 843 F.2d 712 (3rd Cir., 2001).

3. Whether "cause" and "prejudice" excusing any procedural default were present in the circumstances of this case because of the prosecution's erratic trial strategy with respect to lesser included offenses which obscured the need for a specific unanimity instruction to the jury and the futility of further state court review.

4. Whether Delaware's presumptive sentencing system violates the Sixth and Fourteenth Amendments by permitting a judge to enhance a sentence based upon facts neither admitted by a defendant nor tried to a jury.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

INCOME SOURCE: Prisoner wages as education program tutor

AVERAGE MONTHLY AMOUNT DURING THE PAST 12 MONTHS	AMOUNT EXPECTED NEXT MONTH
You	Your Spouse
Employment \$ 45.00	\$ N/A
Self-Employment \$ 0	\$ N/A
Income from real property (such as rental income)	
\$ 0	\$ N/A
Gifts \$ 10.	\$ N/A
Alimony \$ 0	\$ N/A
Child Support \$ 0	\$ N/A
Retirement (such as social security, pensions, annuities, insurance)	
\$ 0	\$ N/A
Unemployment payments \$ 0	\$ N/A
Disability (such as social security, insurance payments)	
\$ 0	\$ N/A
Public Assistance (such as welfare)	
\$ 0	\$ N/A
Other (specify): \$ 0	\$ N/A
Total monthly income \$ 55.00	\$ N/A

2. List your employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.

Employer	Address	Dates of Employment	Gross Monthly Pay
Self employed attorney	16 Snuff Mill Road Centreville, DE 19807	1976-2001	\$5,000. ±

No employment or income from employment since 2001.

3. List your spouse's employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions: N/A

Employer	Address	Dates of Employment	Gross Monthly Pay
N/A	N/A	N/A	N/A

4. How much cash do you and your spouse have? \$None: possession of cash prohibited at prison.

Below, state any money you or spouse have in bank accounts or in any other financial institution.

Financial Institution	Type of Account	Amount you have	Amount your spouse has
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Prison account	Prisoner	Less than \$30.00	N/A
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If you are a prisoner, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement for each account.

Petitioner has ordered a six month statement from the prison business office; that statement will be forwarded to the Court as soon as it is received by Petitioner.

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

YOU	YOUR SPOUSE
Home (Value) N/A	N/A
Other real estate (Value) N/A	N/A
Motor Vehicle # 1 (Value) N/A	N/A
Make & year:	
Model:	
Registration # :	
Motor Vehicle # 2 (Value) N/A	N/A
Make & year:	
Model:	
Registration # :	
Other assets (Value): Contingent, unliquidated, disputed civil rights claims, defamation claim, property claims	
Other assets (Value) N/A	N/A

6. State every person, business or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money: None – no debts are due to Petitioner

Amount owed to you
None

Amount owed to your spouse
N/A

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
None	N/A	N/A

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate:
None

	You	Your Spouse
Rent or Home Mortgage (Include lot rented for mobile home)	N/A	N/A
Are real estate taxes included? ___ Yes ___ No	N/A	N/A
Is property insurance included? ___ Yes ___ No	N/A	N/A
Utilities (electricity, heating fuel, water, sewer, and telephone)	N/A	N/A
Home maintenance (repairs and upkeep)	N/A	N/A
Food	\$25.00	N/A
Clothing	\$ 0	N/A
Laundry and dry-cleaning	\$ 0	N/A
Medical and dental expenses	\$ 0	N/A
Transportation (not including motor vehicle payments)	\$ 0	N/A
Recreation, entertainment, newspapers, magazines, etc.	\$ 0	N/A
Insurance (not deducted from wages or included in mortgage payments)	N/A	N/A
Homeowners or renters	N/A	N/A
Life	N/A	N/A
Health	N/A	N/A
Motor Vehicle	N/A	N/A
Other:	N/A	N/A
Taxes (not deducted from wages or included in mortgage payments)(specify):	\$0	N/A

	You	Your Spouse
Installment payments		
Credit Card (name):	N/A	N/A
Department Store (name):	N/A	N/A
Other:	N/A	N/A
Alimony, maintenance and support paid to others:	N/A	N/A
Regular expenses for operation of business or farm (attach detailed statement):	N/A	N/A
Other (specify):	N/A	N/A
Total monthly expenses:	\$25.00	N/A

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No

If yes, describe on an attached sheet.

10. Have you paid or will you be paying an attorney any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? \$0

If yes state the attorney's name, address and telephone number: N/A

11. Have you paid Or will you be paying anyone other than attorney (such as a paralegal or typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? \$0

If yes state the person's name, address and telephone number: N/A

12. Provide any other information that will help explain why you cannot pay the docket fees for your appeal: I am incarcerated and have no income or assets from which to pay docket or any other appeal-related fees. I am unable to borrow funds to pay those fees and unable, at present, to have others pay those fees on my account.

13. State the address of your legal residence.

Sussex Correctional Institution
Georgetown, DE 19947

Your daytime telephone number: N/A: prisoners are denied incoming calls

Your age: 58 Your years of Schooling: 19

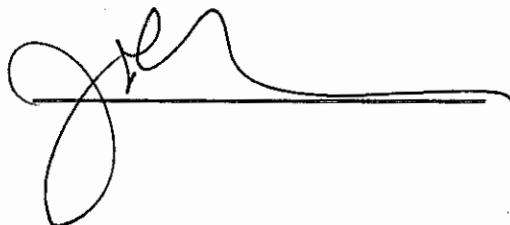
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the attached Motion for leave to Proceed *In Forma Pauperis* was served on August 2, 2007 by depositing the same in the prisoner mail dropbox at Sussex Correctional Institution, Georgetown, Delaware, first class mail, postage prepaid, and addressed to:

Thomas E. Brown, Esq.
Deputy Attorney General
Department of Justice
820 North French Street
Wilmington, DE 19801

I hereby certify under penalty of the laws of the United States of America that the foregoing is true and correct.

Executed on August 2, 2007

A handwritten signature in black ink, appearing to be 'TEB', is written over a horizontal line.

1811



GEORGETOWN, DE
19947
AUG 02 07
PRIORITY
\$4.60
09034861-06



HOW TO USE:



1. COMPLETE ADDRESS LABEL AREA
Type or print required return
address and addressee information
in customer block (white area)
or on label (if provided).



2. PAYMENT METHOD
Affix postage or meter strip to area
indicated in upper right hand corner.



3. ATTACH LABEL (if provided)
Remove label backing and adhere
over customer address block area
(white area).

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John H. Benge, Jr.
From P.O. Box 500
Georgetown, DE 19947

www.usps.com

TO OFFICE OF THE CLERK OF THE COURT
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U.S. COURT HOUSE
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